



Comptroller General  
of the United States  
Washington, D.C. 20548

149272

**Matter of:** CBIS Federal Inc.--Claim for Costs

**File:** B-245844.5

**Date:** May 18, 1993

Joseph J. Petrillo, Esq., and Jessica C. Abrahams, Esq., Petrillo & Hordell, for the protester.  
Lyndia V. Countee, Department of Agriculture, for the agency.  
Richard P. Burkard, Esq., and Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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#### **DIGEST**

1. Where prior decision of our Office sustaining protest provides that protester is entitled to recover its reasonable attorneys' fees, other than those allocable to a particular issue, protester is not barred from recovering some part of the fees, even though protester's counsel is unable to segregate a substantial portion of its fees by issue. Where the protester's counsel is unable to provide a reasoned estimate of the fees allocable to the portion of the protest on which the protester prevailed and the parties are unable to agree to an amount, General Accounting Office will determine the amount.
2. Where agency determination and finding supporting its decision to proceed with contract performance notwithstanding a pending protest, submitted as part of the protest record, contains assertions that the protester, which was the incumbent contractor for the requirement, acted "unprofessionally" and was "uncooperative" during the contract transition period, protester's costs incurred in responding to the statements, which protester considered inaccurate and unfair, are allowable as costs of filing and pursuing protest.
3. Protester is entitled to reimbursement for travel costs incurred in connection with the pursuit of its protest where costs claimed are sufficiently documented.

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#### **DECISION**

CBIS Federal Inc. requests that our Office determine the amount it is entitled to recover from the Department of Agriculture for filing and pursuing its protests against the

award of a contract to Telesec Library Services for library support services.

On September 25, 1991, CBIS filed a protest, which we docketed as B-245844, questioning the agency's evaluation of Telesec's proposal and alleging that the awardee engaged in "bait and switch" tactics by proposing key personnel who would be replaced after award. In its November 18 comments to the agency report submitted in response to the protest, CBIS supplemented its protest "by filing new protest grounds" concerning the agency's negotiation process. CBIS argued that the agency engaged in technical leveling by "coaching" Telesec in multiple rounds of discussions to improve its technical proposal. We treated this allegation as a new protest, which was docketed as B-245844.2, and we requested an administrative report from the agency. In the November 18 filing, CBIS also continued to pursue its arguments regarding Telesec's key personnel. It argued specifically that Telesec made false representations about two of its key personnel and failed to provide a letter of commitment for one. Our Office subsequently consolidated the protests, and on March 27, 1992, we issued one decision addressing all issues raised. CBIS Federal Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308.

In that decision, we sustained in part CBIS' protest because the awardee had proposed two key personnel in its best and final offer whom it reasonably could not have expected would be available to perform the contract. We denied the remainder of the protest, including CBIS' allegation that the agency engaged in improper technical leveling. We determined that CBIS was entitled to recover its costs of filing and pursuing its protest, except those costs or attorneys' fees allocable to its protest allegation that the agency engaged in technical leveling.

The protester subsequently submitted a claim with the agency totaling \$32,092.93. The majority of this claim is not in dispute. The agency determined, however, that \$11,249.03 of the claimed \$32,092.93 is not allowable. The bulk of this disputed amount, \$10,623.32 relates to attorneys' fees, while the remainder, \$625.71, relates to CBIS company costs or expenses. We find that the protester is entitled to \$5,311.66 of the disputed attorneys' fees and is also entitled to the CBIS company costs or expenses of \$625.71.

#### ATTORNEYS' FEES

Since the protester was not entitled to the costs allocable to the technical leveling issue, CBIS' counsel attempted to segregate from its itemized billing statements those items which related to issues other than technical leveling. The protester's counsel was able to identify fee entries in his

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billing statements which clearly do not relate to the allegation of technical leveling. The agency has agreed that these fees are allowable. The dispute about the proper amount of attorneys' fees arose because a significant portion of the fees associated with the CBIS protest, \$21,246.64, according to the firm's counsel, could not be segregated by legal issue and relate to technical leveling and other issues. Protester's counsel states that during the course of the protest, his firm simultaneously researched and developed several legal issues, including its allegation that the agency engaged in technical leveling. In this regard, protester's counsel states that it is not the practice of his firm, nor of the legal profession in general, to delineate the specific amount of time spent on a specific issue during the course of a legal proceeding. He concludes that it was impossible to determine the precise time spent on each issue from the time records relating to technical leveling as well as other issues. CBIS' counsel asserts that under the circumstances, allowing 50 percent of this unsegregated amount, or \$10,623.32, would be fair and equitable.

The agency argues that it should not be required to pay any of this unsegregated amount since CBIS' counsel is unable to demonstrate exactly what portion of those fees were incurred in pursuing the technical leveling protest ground, for which we specifically did not allow recovery, and what portion of the fees relate to other issues, which are allowable. The agency asserts that it is the obligation of the attorney to identify its allowable fees and concludes that where allowable and unallowable fees cannot be distinguished, the entire amount should be disallowed.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (1988), authorizes our Office to declare that an appropriate interested party is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees, where we find that "a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation." The entitlement to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in the Act. Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572. Here, the protester brought to our attention the fact that the award was made on the basis of a proposal that did not accurately reflect the availability of key personnel. The record shows, and the agency does not dispute, that the protester incurred a portion of the unsegregated attorneys' fees in pursuing the protest ground upon which it ultimately prevailed. Accordingly, we think that CICA contemplates a proportionate recovery of fees.

We are not persuaded by the agency that the protester may not recover any of its attorneys' fees because, essentially, its counsel failed to itemize its billing statements by legal issue. Based on our review, the bills provide the amount of detail and explanation ordinarily found in attorneys' billing statements. Indeed, the agency does not contest the protester's statement that it is not the practice of his firm, nor of the legal profession in general, to delineate the specific amount of time spent on a specific issue during the course of a legal proceeding, and we have no reason to question the protester's position in this regard. See Kunz Const. Co., Inc. v. U.S., 16 Cl. Ct. 431 (1989); See also Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538. While counsel here risks a lower cost award than otherwise might be justified if its billing statements were segregated according to the issues presented, CBIS should not be barred from recovering some part of the unsegregated attorneys' fees merely because its counsel did not prepare its billing statements in this manner. See Digital Equipment Corp., GSBICA No. 9285-C(9131-P), Aug. 24, 1989, 89-3 BCA ¶ 22,181. The protester's limited success has benefitted the competitive procurement system by bringing to light the agency's failure to conduct a procurement in accordance with law and regulation. The protester is therefore entitled to be reimbursed for its costs incurred in pursuing the issue upon which it prevailed.

Next, we turn to the question of an appropriate amount of recovery. As stated, the protester has asserted that an award of fees of 50 percent of the unsegregated amount would be fair and equitable. The protester, however, has put forth no rationale for this percentage, and in our view it does not appear to be supported by the record. In the absence of an agreement by the parties (or even an articulated method of computing a fair amount), we will determine an amount which we think is appropriate. Upon review of the protest submissions containing arguments relating to technical leveling and other issues, it appears that the vast majority of the protester's effort was expended in pursuing the technical leveling protest ground. In our view, approximately 75 percent of the effort related to technical leveling. Thus, we find that an award of attorneys' fees of \$5,311.66 (25 percent of \$21,246.64) is commensurate with the effort spent on issues other than technical leveling.

## IN-HOUSE PERSONNEL COSTS

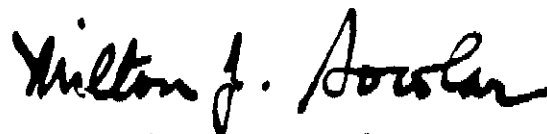
The agency also disallowed \$610.71 claimed by CBIS for time spent by an employee for reviewing and responding to the agency determination and finding (D&F) in support of its decision to proceed with contract performance notwithstanding the protest. We find these costs to be allowable in full.

The agency's D&F, submitted as part of the protest record, contained assertions that CBIS, the incumbent contractor, was "uncooperative" and "unprofessional" during the contract transition period. CBIS acknowledges that it was not required to respond to the D&F, but the firm objected to the agency's characterization of its conduct and submitted a response in order to provide "details surrounding the sequence of events and communications" between it and the agency. The firm concluded that it was "unfair and inaccurate for [the agency] to allege that CBIS acted unprofessionally in any manner."

In our view, these costs were "costs of filing and pursuing its protest" and therefore are allowable. See CICA, 31 U.S.C. § 3554(c)(1)(A). The record shows that the protester incurred the expenses at issue here in an attempt to respond to what it believed to be unfair and inaccurate allegations about the firm made during the protest by the agency. We do not think that it was unreasonable for the protester to respond in its own defense in an attempt to clarify the protest record. While CBIS' alleged actions during the contract transition period were not the subject of the protest, as the agency points out, we think that the costs involved in defending its business reputation by responding to an agency protest submission were reasonably incurred in pursuing the protest. Accordingly, we see no reason to limit CBIS' recovery in this regard.

Finally, the agency disallowed \$15 in travel expenses incurred by a CBIS employee. While the agency states that the protester failed to provide information on the purpose of the trips, we think an adequate explanation for the trips was provided. The record shows that each of these trips were made in order to consult with CBIS counsel concerning the protest. Moreover, CBIS has provided the dates of the trips and has identified the subject of the discussions with counsel by reference to specific protest submissions. Consequently, we allow the \$15 in travel expenses. Armour of America, Inc.--Claim for Costs, 71 Comp. Gen. 294 (1992), 92-1 CPD ¶ 257.

Accordingly, we find that in addition to the \$20,728.34 which is not in dispute by the parties, CBIS is entitled to \$5,937.37 as the costs of filing and pursuing its bid protest.



Acting Comptroller General  
of the United States